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No. 387

In the Supreme Court of the United States

OCTOBER TERM, 1930

ETTA M. KLEIN, FORMER ADMINISTRATRIX OF THE ESTATE OF SOLOMON KLEIN, DECEASED, ETC., ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

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ETTA M. KLEIN, FORMER ADMINISTRATRIX OF THE Estate of Solomon Klein, deceased, etc., et al., petitioners

v.

THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 14) has not yet been reported.

JURISDICTION

The judgment sought to be reviewed was entered on June 2, 1930. (R. 19.) The petition for certiorari was filed August 26, 1930. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether a deed of real property by the decedent should be construed to result in a transfer intended to take effect in possession or enjoyment at his death; and, if so construed, whether the property so transferred under a deed executed prior to the enactment of the Revenue Act of 1918, but after the enactment of the Revenue Act of 1916, may constitutionally be included under Section 402 (c) of the Revenue Act of 1918, in the gross estate of the transferor who died on September 17, 1919.

STATUTES INVOLVED

The statutes involved are set out in the Appendix, pp. 6–8, *infra*.

STATEMENT

By a deed dated July 1, 1918, the decedent conveyed certain real estate in Illinois to his wife in the following terms (R. 12):

> First. To have and to hold the said lands unto the said grantee for and during the term of her natural life, and if she shall die prior to the decease of said grantor then and in that event she shall by virtue hereof take no greater or other estate in said lands and the reversion in fee in and to the same shall in that event remain vested in said grantor, his heirs, and assigns, such reversion being hereby reserved to said grantor and excepted from this conveyance.

Second. Upon condition and in the event that said grantee shall survive the said grantor, then and in that case only the said grantee shall by virtue of this conveyance take, have, and hold the said lands in fee simple, unto the sole use of herself, her heirs, and assigns forever.

Said grantee covenants with said grantor that she will during the lifetime of said grantor, promptly pay and discharge all taxes and assessments which may become due and payable on said lands, that she will keep all buildings and improvements situated thereon in good tenantable condition and repair and fully insured against loss by fire in companies acceptable to said grantor in the names of both said grantor and said grantee and in the event either of said buildings shall be destroyed or damaged by fire will apply all the insurance moneys received on account of such fire to the reconstruction or repair of the buildings damaged or destroyed, unless the said grantor shall in writing consent to otherwise invest the same in such manner that said grantee shall enjoy the income derived therefrom during her life and so that the capital shall belong to that one of the parties hereto who shall survive the other.

It is agreed that the conveyance was not in contemplation of death. (R. 12.) The grantor died intestate on September 17, 1919. (R. 11.) The grantee, his widow, survived him. (R. 11.)

Upon auditing the returns of his administratrix the Commissioner of Internal Revenue included in the gross estate the value of the real estate conveyed on July 1, 1918. (R. 12.) A claim for refund was rejected to the extent of the tax due as the result of the inclusion in the gross estate of the value of the realty after having deducted the value of the life estate of the grantee. (R. 13.) The petition was filed in the Court of Claims on March 19, 1928, and dismissed by that court on June 2, 1930. (R. 5.)

DISCUSSION

We submit that the decision below is correct. However, the transfer held taxable as one intended to take effect in possession or enjoyment at death is similar in some respects to the transfer held not taxable by this Court in *May* v. *Heiner*, 281 U. S. 238. In that case after the execution of the deed the settlor had no interest in the corpus of the trust, but only the right to the income during her life. In the instant case the settlor retained an interest in the corpus of the trust. He held, until his death, the fee simple in reversion, subject to be divested upon his wife's surviving him. A transfer under a trust deed creating estates like those in the instant case was held taxable by the Circuit Court of Appeals for the Seventh Circuit in the case of *Commissioner* v. *McCormick*, decided September 20, 1930, and not yet reported. This case, as we contend, is distinguishable from *May* v. *Heiner, supra*,

and was correctly decided below, but the question involved is an important one, which will arise in many cases. Accordingly we do not oppose the granting of the writ of certiorari.

Respectfully submitted.

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OCTOBER, 1930.

APPENDIX

STATUTES INVOLVED

The Revenue Act of 1916 (Act of September 8, 1916, c. 463, 39 Stat. 756, 777) provided in part:

> SEC. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:
>
> [Here follows a table of percentages.]
>
> SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:
>
> * * * * *
>
> (*b*) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of

a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * *

The Revenue Act of 1918 (Act of February 24, 1919, c. 18, 40 Stat. 1057, 1096, 1097) provides in part:

SEC. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

[Here follows a table of percentages, materially higher than those in the Revenue Act of 1916.]

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at

any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title * * *.

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